



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL 58 OF 2009**

**JOSEPH MUKENI MWAFULULA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant (Joseph Mukeni Mwafilula) was convicted on a charge of robbery with violence contrary to section 296 (2) of the Penal Code. The charge against him was that on 16<sup>th</sup> September 2005 at Mtwapa township in Kilifi District, jointly with others not before court and being armed with dangerous or offensive weapons, namely pangas, metal bars, and simis, robbed Mwanafatuma Swaleh Mohamed of one phone Sony Ericson, mobile phone Samsung, DVD Machine make Samsung, one CD player Walkman, one bag, a birth certificate and cash kshs. 3000/- all valued at Kshs. 56,199/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Mwanafatuma Swaleh. The appellant denied the charge, and after hearing in which four prosecution witnesses testified and appellant was the only defence witness, he was sentenced to death.

Mwanafatuma Swaleh (PW1) lives in Mtwapa and operates a salon. On 15-9-05 at 11.00pm while at home, her colleague Pauline had given the keys to some people who were calling themselves police. They used those keys to open the house and get into the sitting room. There were four gangsters in the sitting room who pushed PW1 and her husband into the bedroom and ordered them to cover themselves with bedsheets. The electricity bulb was on. They ransacked the house and carried away electrical goods. It was her evidence that they were armed with metal bars and pangas, and they took away DVD Samsung, 4 mobile phones, Kshs. 150,000/- cash, 250,000 Euro, Gold rings and earrings, bracelets, camera, a handbag and bank cards. PW1 was hit on the head and lost consciousness - she found herself at the Coast General Hospital. In November 2007, she spotted one person who went to

sell hair accessories in her salon and she got him arrested. It was her evidence that he was the one who was giving out the electrical goods from her house to his colleagues who were outside.

Then she said:

***“He was not arrested with any of my goods, nothing was recovered.”***

John Bosco Kituli Kikenye (PW2) told the trial court how he heard some people shouting, calling each other corporal, on the night of 15-9-05. So he opened the door and met two people who had metal bars. Two of the gangsters had entered into the house of a neighbour, so pW2 shouted and a few neighbours came out - it was his evidence that PW1's house was the first one to be attacked - she lived in the same block as PW2. PW2 was able to recognize two men because there was electricity light and he told the trial court that appellant was one of the gangsters whom he recognized and later identified him at an identification parade.

Pc Alfred Ruto (PW3) was among the police officers who rushed to Mtwapa upon receiving a report from complainant that she had spotted one of the people who had robbed her in 2005. He arrested appellant, but made no recovery.

An identification parade conducted by IP Tobia Abondo on 26-11-07 led to appellant being identified by PW2 and one Pauline.

In his unsworn defence, the appellant told the trial court that he was a hawker in Mtwapa. On 24-11-07, he woke up and went to sell his wares (being blonde hair accessories) and when he offered his goods for sale at a salon, - he was arrested. He maintained that he knew nothing concerning the incident that occurred on 16<sup>th</sup> September 2005.

The trial magistrate in his judgment found that there was sufficient evidence that actual violence had been used against PW1 who was struck on the back of the head and lost consciousness and that the group was armed and there was more than one attacker, so the ingredients constituting robbery with violence had been satisfied.

The trial magistrate held that appellant had been properly identified by PW1 and PW2 with the aid of electricity light and subsequently at an identification parade which the trial magistrate termed as being conducted in a professional manner. He noted that there could be no mistake as PW1 was very specific in remembering the role appellant played during the robbery and that the lapse of two years made it impossible to recover any of the stolen items. He was satisfied that appellant was properly identified.

Appellant challenged both conviction and sentence on amended grounds namely that;

- (1) The evidence was at variance with the charge.
- (2) Identification was not satisfactory as the trial magistrate did not consider.
  - (a) the duration of observation
  - (b) the circumstances were stressful
  - (c) No descriptions or features were mentioned.
  - (d) Visual memory may fade with the passage of time, considering that the robbers were not people known to the victims.
- (3) The conviction was against the weight of evidence adduced which did not prove the case beyond reasonable doubt.

(4) His defence was improperly dismissed.

In his written submissions, appellant argued that it was not suggested how long he was under observation by PW1 and PW2 so as to make identification easy and free of error bearing in mind that at the time of reporting, neither witness gave a description of the physical features of the robbers. To support his argument, appellant cited the case of **Moses Mungai Muchero v R Cr. App. No. 63 of 1987**, which held that:

***“In matters of identification, the first report to the police should be put to evidence to help check whether a witness could identify a suspect and by what means”***

There contradiction regarding what was stolen, with the police officer including items which PW1 had not mentioned.

The State conceded the appeal, and on the issue of identification Miss Waigera submitted that although PW1 testified that there was electricity light it was not clear whether the light was in the sitting room or the bedroom, bearing in mind that upon entering the sitting room, the robbers immediately pushed them into the bedroom and ordered them to cover themselves.

Further that Pauline who was said to have given out the keys was not called as a witness, yet her evidence was crucial in confirming whether appellant was among the people whom she had given the keys. Also that PW1's husband should have been called as a witness to help in ascertaining whether appellant was among the robbers.

On this issue of identification both by PW1 and PW2, what deals a blow to an otherwise perfect situation is the omission to establish where the electricity light

bulb referred to was – was it a security light, a bulb in the sitting room, or in the bedroom. If it was in the bedroom then where was the appellant picking the goods from and passing them to his colleagues outside i.e what was the position of the appellant in relation to PW1 and the light.

And if the bulb was in the sitting room, then again, how much time did PW1 spend in the sitting room to enable her see and identify appellant from amongst the four gangsters and what was the position of the bedroom in relation to the sitting room? These questions were not resolved and it made the opportunity for identification questionable.

As regards the evidence of PW2 on identification, he claimed that two gangsters entered into PW1's house and he met two at his door whom he recognized because there was electricity light – yet he did not disclose where this light was positioned nor did he disclose the distance between his house and that of PW1.

The upshot is that here were too many loopholes on the issue of identification and the trial magistrate erred in finding that appellant was sufficiently identified, bearing in mind that this incident occurred two years before appellant was arrested, no recoveries were made from appellant and certainly visual memory may fade with the passage of time and its possible for one to mistake one person for another.

I think the entire appeal revolved around the issue of identification, and having thus found, then the conviction was unsafe and is quashed. The sentence herein is set aside and appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **9<sup>th</sup>** day of **June 2010**.

**H. A. Omondi**  
**JUDGE**

**M. Odero**  
**JUDGE**